No. 83-505

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ELECTRONIC CURRENCY CORPORATION and MELVIN E. SALVESON,

Petitioners,

—vs.—

WESTERN STATES BANKCARD ASSOCIATION, BANK OF CALIFORNIA, CROCKER NATIONAL BANK, UNITED CALIFORNIA BANK, WELLS FARGO BANK, MASTERCARD INTERNATIONAL, INC., BANK OF AMERICA, and VISA U.S.A., INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October 24, 1983

COUNTER-STATEMENT OF QUESTION PRESENTED

Does the four-year statute of limitations bar a private antitrust suit seeking damages for an alleged conspiratorial refusal to deal beginning in 1966, which was final at the latest by 1972, when the suit was not filed until 1977?

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PRELIMINARY STATEMENT

The Petition provides no basis for review by this Court. Petitioners do not even suggest that there is a conflict among the Courts of Appeals concerning the issues resolved by the Courts below or that any important or novel issue for resolution by this Court is involved. See Rule 17 of the Rules of this Court. Rather, petitioners' complaint is simply that the Courts below misinterpreted the facts of the case. Accordingly, the Petition should be denied.

COUNTER-STATEMENT OF THE CASE

In 1981, the District Court granted respondents'[1] motion for summary judgment in an unpublished opinion on the ground that the claims of petitioner Salveson and his shell corporation, Electronic Currency Corporation (hereafter, collectively, "Salveson") were barred by the statute of limitations. The District Court based its decision on its review of an exhaustive record containing interrogatory answers, documents, and depositions, including 49 volumes of deposition testimony by Salveson himself. The Court of Appeals unanimously affirmed

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1 The following information concerning respondents is provided pursuant to Rule 28 of the Rules of this Court. Respondent Bank of America is a wholly-owned subsidiary of Bank-America Corporation, and is affiliated with Decimus Computer Leasing Corp., Decimus Corp., BA Lepanto Building Corp., Banca D'America e D'Italia, Finabai-Societe Financiere S.A., Banco Columbo Americano, Banco International S.A., BA Finance Corp. (Philippines), BA (Australia) Ltd., BankAmerica Representacao e Servicos Ltd., Corporacion Financiera Asociada S.A., Financial Group of Kuwait, Jamaican American Merchant Bankers Ltd., Ouvidor Industria e Comercio Ltd., MISR America International Bank S.A.E., Savannah Bank of Nigeria Ltd., First Indo Leasing Co., Arrendadora Comermex S.A., Commercial Bank of Africa, BankAmerica Finance Ltd., BAI Leasing S.p.A., and Tokyo Investment Securities (International, Inc.). Respondent The Bank of California is a wholly-owned subsidiary of BanCal Tri-State Corporation. Respondent Crocker National Bank is a wholly-owned subsidiary of Crocker National Corporation. Respondent First Interstate Bank of California is a wholly-owned subsidiary of First Interstate Bancorporation. Respondent Wells Fargo Bank is a wholly-owned subsidiary of Wells Fargo & Company. Respondent MasterCard International, Inc. is a non-stock membership corporation consisting of approximately 14,000 banks and other financial institutions. Respondent Western States Bankcard Association is a non-stock membership corporation consisting of approximately 200 banks and other financial institutions. Respondent VISA U.S.A., Inc. is a non-stock membership corporation consisting of approximately 13,000 banks and other financial institutions and is itself a member of Visa International Service Association, a non-stock membership corporation consisting of approximately 13,700 banks, groups of banks, and other financial institutions worldwide.

in an unpublished opinion and thereafter denied Salveson's petition for rehearing and suggestion for rehearing *en banc*.

Both Courts below found that there was no genuine dispute that (*i*) Salveson had believed since 1966 that there was a conspiracy to refuse to deal with him and that he had been threatening suit since that time; (*ii*) respondents' alleged conspiratorial refusal to deal with Salveson was final by 1972 at the latest (despite subsequent unsuccessful efforts by Salveson to persuade certain respondents to do business with him); and (*iii*) Salveson's alleged injury and cause of action accrued at the latest by 1972, more than four years before suit was filed.[2]

A. Summary of the Factual Record.

Because the Petition fails to discuss any of the facts upon which the judgment was based, they are briefly set forth below.

Salveson began making proposals for credit card operations to certain of the respondent banks in 1963. The banks viewed these proposals as simplistic, conclusory descriptions devoid of operational detail or financial analysis, and did not pursue them.[3]

In 1966, Salveson tried to become the "system operator" for respondent Western States Bankcard Association ("WSBA"), an association formed to act as a clearinghouse for banks that would issue credit cards under the name "Master Charge". When WSBA refused to so engage Salveson, he threatened an antitrust suit. His counsel advised him that he might have claims against some of the respondents for a joint refusal to deal, and his counsel so informed WSBA in writing.[4]

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2 For purposes of respondents' motion, the District Court assumed that Salveson's allegations of a conspiracy were true. A-8. However, respondents deny that there was any conspiracy.

3 Elmer Dep. 99-100, CR 276; *id.* 465, CR 278; Salveson Dep. 537, CR 317.

4 Salveson Dep. 3274, 3280, CR 339; Salveson Exs. 3460-62, CR 376.

In March 1967, the banks settled Salveson's claims by a mutual, general release (the "1967 Agreement"). A-3. It made crystal clear that WSBA and its members were buying their peace from any claim by Salveson that they had wrongfully refused to deal with him. It also provided that WSBA would negotiate with Salveson concerning an "interchange agreement" for any bank for which he obtained authority to negotiate. A-3.

After signing the 1967 Agreement, Salveson continued to propose his "system" unsuccessfully to banks all around the country. But, according to Salveson, his solicitations were met with "a wall of silence as if I had [leprosy]" because he was unable to obtain "affirmative statements from WSBA as to our entitlements under [the 1967 Agreement]."[5] Salveson testified that WSBA's actions in 1967-68 so damaged his ability to market his "system" to banks that they "stopped [him] from going forward at all and for all time" in soliciting banks. He stopped soliciting banks by mid-1969 because he concluded that the market had been "preempted".[6] Salveson repeatedly considered litigation against respondents between 1968 and 1970 because he believed that he had been injured by their alleged antitrust violations. But he did not file suit.[7]

In December 1970, Salveson wrote to Elmer, then Senior Vice President of respondent Wells Fargo, Chairman of respondent WSBA and a director of respondent Interbank,[8] inviting Wells Fargo to "participate in the full Electronic Currency System."[9] As the District Court found,

> "Elmer rejected the proposal, stating: 'We are fearful that our participation in this system might be construed as a

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5 Salveson Dep. 746-47, CR 318; *id.* at 785-86, CR 319.

6 Salveson Dep. 662-745, CR 318; *id.* at 785, CR 319; Salveson Aff. 13-14, CR 455.

7 Salveson Dep. 782-784, CR 319.

8 Interbank later changed its name to MasterCard International, Inc.

9 Salveson Ex. 3340, CR 393.

> conflict of interest and evidence of bad faith toward the other member banks that joined us in forming [WSBA and Interbank].' " A-4-5.

A few weeks later Salveson again wrote to Elmer, asking if Wells Fargo would act as an "interchange bank" for Salveson's proposed Electronic Currency System and stating that Salveson "would like now to negotiate the basis for interchange between banks in Electronic Currency System and 'Master Charge.' " Elmer again rejected Salveson's proposals, referring to the reasons stated in his prior letter.[10] Salveson testified that Elmer was acting at the time on behalf of Wells Fargo, WSBA, Interbank and their members, and that Elmer's refusal was part of the continuing conspiracy among respondents to keep him out of the credit card business.[11]

In 1975, Salveson again asked respondents to negotiate. Respondents again refused but, as the Courts below found, this refusal caused no new injury to Salveson. Finally, after more than ten years of threats, Salveson brought this action in March 1977; his amended complaint alleged that respondents "agreed to refuse and, continuously during the period 1967-78, refused to deal with [him]." [12]

B. Rulings of the Courts Below.

The District Court, relying on Salveson's own testimony, held that in late 1970 Elmer rejected Salveson's requests for interchange under the 1967 Agreement, and that by 1972 at the latest (*i*) Salveson was fully aware of the alleged conspiracy; (*ii*) respondents' refusals to deal were final; and (*iii*) Salveson understood that the effect of the refusals was to exclude him

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10 Salveson Dep. 2150-51, CR 332; Salveson Exs. 3341-42, CR 393.

11 Salveson Dep. 3100-01, 3149-52, CR 338.

12 The original complaint included a count for breach of the 1967 Agreement but Salveson later dropped that claim.

from the credit card business.[13] Accordingly, the District Court concluded that Salveson's claim was barred by the four-year statute of limitations. A-8-11.

The Court of Appeals unanimously affirmed, stating:

> "We review an appeal from a grant of summary judgment *de novo* to determine whether the district court was correct in finding that no genuine issues of material fact remained for trial and that, viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, the movants were entitled to prevail as a matter of law. Having done so, we find that the district court was correct.
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> * * *
>
> "The record supports the district court's conclusions that the defendants' refusal to deal with Salveson and ECC was final, clear and unequivocal by 1972, and that the later refusals in 1975-76 were merely a continuation of that position. The amended complaint itself alleges that defendants 'agreed to refuse and, continuously during the period 1967-78[14], refused to deal with plaintiffs.' Salveson had several times been rejected by the defendant banks by 1972 in his bid to become the 'system operator' for their credit cards. He testified that, from the start, the banks had continued their policy of refusing to allow him to get into the business. Salveson's renewed requests to

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13 With respect to Salveson's renewed efforts to negotiate with respondents in 1975-76, the District Court found that Salveson's own testimony established that "he believed it was futile to attempt to seek an interchange agreement with defendants" and that "defendants, through words and actions, had made it clear they did not expect to do business with him." A-11.

14 In the Appendix to the Petition, these dates erroneously appear as "1967-68." An additional significant typographical error appears in the Petition itself, on page 4, fn. 3, where it is asserted that "Interbank Card Association became an assign of WSBA in 1979"; although the description is inaccurate, the date referred to is 1969.

negotiate in 1975-76 were not based on any new events reasonably encouraging an expectation that the bank's policies would be reversed at that late stage, but were more on the order of 'forlorn inquiries by one all of whose reasonable hopes had previously been dashed.' *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 72 (9th Cir.), *cert. denied*, 444 U.S. 900 (1979)." A-16, 13.

ARGUMENT

I. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ANY RULING FROM ANY OTHER FEDERAL COURT.

Salveson's Petition sets forth no reason for granting the writ. See Rule 17 of the Rules of this Court. The decision of the Court of Appeals does not conflict with any decision from any other Court of Appeals. Salveson does not point to any authority applying any rule concerning the statute of limitations different than that applied by both Courts below. Indeed, Salveson does not appear to contest the rule of law applied below.

Instead, most of Salveson's Petition is devoted to a recitation of the particular facts of this case, few if any of which are in dispute. This is precisely the sort of case which this Court ought not to review—one which turns upon the application of a well settled and uniformly applied rule of law to unique facts which were thoroughly analyzed by the lower courts. The resolution of this case affects no one but the parties and its review by this Court can establish no guidance for any other litigants or courts. Salveson's Petition is an invitation to this Court to conduct a detailed and far reaching *de novo* review of the facts of this case. The invitation should be declined.

In a vain attempt to present some issue of law for review, Salveson relies upon a passage from *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971), where this Court observed:

> "In the context of a continuing conspiracy to violate the antitrust laws . . . *each time a plaintiff is injured* by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitation runs from the commission of the act." (emphasis added).

The rulings below do not conflict—and, indeed, are consistent—with *Zenith*. The District Court expressly recognized that "a civil cause of action under the [antitrust laws] arises at each time the plaintiff's interest is invaded to his damage, and the statute of limitations begins to run at that time." A-8. Moreover, as *Zenith* made clear, in a passage not quoted by Salveson, the statute runs, not only for those damages immediately suffered, but for "all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date." 401 U.S. at 339.

Both Courts below found that, on the undisputed facts, the alleged refusal to deal was final by 1972 at the latest and that Salveson's claim for all damages stemming therefrom accrued by that date. Accordingly, his claim filed more than four years later was barred.

II. THE COURT OF APPEALS CORRECTLY APPLIED A WELL SETTLED AND UNIFORMLY RECOGNIZED RULE OF LAW.

The Petition presents no novel or unresolved issue of law. Both Courts below applied well established authority that an antitrust claim based on a continuing refusal to deal is barred by the statute of limitations four years after the refusal becomes final. *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 70-72 (9th Cir.), *cert. denied*, 444 U.S. 900 (1979); *David Orgell, Inc. v. Geary's Stores, Inc.*, 640 F.2d 936 (9th Cir.), *cert. denied*, 454 U.S. 816 (1981); *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd.*, 185 F.2d 196 (9th Cir. 1950), *cert. denied*, 340 U.S. 943 (1951).

As the District Court stated:

> "[W]here plaintiff has suffered damage in prelimitation periods but alleges the damage and conspiracy was ongoing with continuing harm . . . 'the question is whether [the plaintiff's] injury was the consequence of multiple wrongs or a single irrevocable and *permanent injury*.' " A-8-9, *quoting In re Multidistrict Vehicle Air Pollution*, *supra*, 591 F.2d at 70-71.

In applying the applicable rule to the facts of this case, the District Court found that:

> "No new forbidden overt acts were committed by defendants that caused any *new injury* to plaintiff after the initial rejection of his system." A-10. (emphasis added).

This ruling was clearly correct. Salveson himself testified:

> "So the first step was to notify me, as they did, toward the end of September, early October 1966, when I protested they made this pretense of a settlement with me and thought I would go away but I didn't. *And every time that I came back, all they said was no to any reasonable request that we open up such an interchange agreement.*
>
> Now, this applied both originally to . . . CBCA, then WSBA, and then as it evolved in the larger sense to Interbank and *they all continued the same policy of refusing to allow me to get into this business. . . .* " Salveson Dep. 3116, CR 338 (emphasis added).

Here, as in *Air Pollution*, respondents allegedly excluded Salveson from the market long before the commencement of suit. That is when any injury occurred. Subsequent reiterations changed nothing.

What distinguishes continuing refusals to deal, such as those alleged in this case, *Air Pollution* and *Orgell*, is that all the injury occurs at the time the refusal to deal becomes final, as the Courts below found it did here by 1972 at the latest. Even

though damages may continue to accrue after the limitations period expires, they are merely the "unabated inertial consequences of some prelimitations action." *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1053 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 729 (1983). Likewise, overt acts within the limitations period, even if in furtherance of the alleged conspiracy, do not give plaintiff a new cause of action because they cause no new injury.

Salveson relies primarily upon his renewed requests for "interchange" in 1975-76 to bring himself within the limitations period. Pet. 5-8. Both Courts below found that respondents' actions in 1975-76 caused no injury different from the original alleged exclusion and did not revive Salveson's claim. As the District Court found:

> "If plaintiff still had hopes in 1975-76 . . . it is difficult to see what actions by defendants sustained that hope. The defendants, through words and actions, had made it clear they did not expect to do business with him. They had told him so expressly in 1971 and 1972. . . . Any negotiations in 1975-76 were not between Salveson, as systems operator, and the banks, as potential clients, but the opposite. The defendants were again refusing his services or program and instead offering to allow him to become their client or member of their system." A-11.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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